EXHIBIT "H"

United States District Court

District of Utah, Central Division

Holly Refining & Marketing Company – Woods Cross LLC

v.

Mullen Crane and Transport, Inc.; Olsen-Beal Associates Co.; and Benham
Constructors, LLC

Expert Witness Report of

Patrick Kilbourne

September 18, 2012

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I.   INTRODUCTION

I was retained by Mullen Crane and Transport, Inc. ("Mullen Crane"), Olson-Beal Associates Co ("Olson-Beal") and Benham Constructors, LLC ("Benham")—collectively, the "Defendants"—to review and comment on the August 17, 2012 report of William B. Abington, who was retained by Holly Refining & Marketing Company – Woods Cross LLC ("Holly"). In his report, Mr. Abington opined that Holly experienced lost profits of $2,109,475 due to the alleged actions of the Defendants.

This report describes my work and summarizes my opinions and the bases for those opinions. The opinions and findings expressed herein are based upon my work, my professional experience and the facts observed in reviewing the information itemized in Attachment 2 to this report. If additional information comes to my attention, I may supplement, update or modify this report.

This report has been prepared solely in connection with the litigation referenced herein and is intended for no other use. In preparing this report, I have assumed that the Defendants are liable for the claims alleged against them by Holly. However, I have no opinions regarding the Defendant's liability, nor have I been asked to provide any such opinions. This assumption of liability is typical in damage analyses.

II.   QUALIFICATIONS

I am a director at Berkeley Research Group, LLC ("BRG"). BRG is a leading global expert services and consulting firm with over 400 experts and professionals. We provide independent expert testimony, litigation and regulatory support, authoritative studies, strategic advice, and document and data analytics to major law firms, Fortune 500 corporations, government agencies and regulatory bodies around the world. BRG

experts and consultants specialize in the provision of sophisticated economic, financial and analytical advice across a wide range of disciplines, including antitrust and competition policy, complex damages, finance, health care, intellectual property, valuation and workforce issues. In addition, BRG advises clients in major industry sectors with compliance, business process improvement and strategy consulting.

I have over 18 years of experience in public accounting and consulting and am a Certified Public Accountant (CPA), a Certified Management Accountant (CMA) and a Certified Fraud Examiner (CFE). I am also Certified in Financial Forensics (CFF) and Accredited in Business Valuation (ABV) by the AICPA. I earned a Master of Business Administration (MBA) degree from the University of Pennsylvania's Wharton School of Business and Master of Accounting and Bachelor of Science degrees from Brigham Young University.

Throughout my career, I have spent considerable time calculating damages related to commercial litigation and have provided economic and financial consulting services both inside and outside of the context of litigation. I have been retained as an expert and have testified in a variety of settings on various matters, including accounting, finance, internal cost accounting, accounting investigations and lost profits. My rate is $450 per hour. A copy of my Curriculum Vitae is attached as Attachment 1.

III.   BACKGROUND

The following is a summary of the events leading up to this litigation. It is not meant to be testimony regarding the factual background of the case; it merely serves as a frame of reference for the opinions that follow this section.

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Holly is an independent energy company engaged in crude oil refining. Holly operates a refinery in Woods Cross, Utah. Holly hired Benham to help install a Hydro Cracker unit in its Woods Cross refinery. Benham hired Olsen-Beal as a subcontractor on the project, and Olsen-Beal hired Mullen Crane as a subcontractor to help with the lifting of heavy materials on the project.

On April 23, 2008, at 4:55 PM,[1] a Mullen employee was operating a fork lift in the trailer park lot of the Holly facility. The employee hit an overhead power line with the forklift, resulting in a blown fuse at the Rocky Mountain Power substation and a loss of electrical power at the Woods Cross refinery (the "Incident"). A Rocky Mountain Power utility crew responded to the Incident and had power restored to the refinery by 8:10 PM.[2] Holly resumed processing crude oil at 2:00 AM on April 24, 2008, 9.08 hours after the loss of power.[3]

Holly filed a lawsuit alleging that the actions of the Defendants caused Holly to experience lost profits. On August 17, 2012, Mr. Abington submitted a report in this matter opining that Holly's lost profits related to the Incident were $2,109,475 for the period of April 23 through April 29, 2008 (the "Damage Period").[4]

IV.   OPINIONS

This section of my report details my opinions regarding Holly's damages as put forth by Mr. Abington in his August 17, 2012 report. My opinions are as follows:

1. Mr. Abington overstated Holly's lost production volumes.

2. Mr. Abington overstated Holly's incremental profit per barrel.

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[1] See the incident report at HWX000008.
[2] See the incident report at HWX000018.
[3] See BEN 000012.
[4] See the August 17, 2012 report of William B. Abington, page 3.

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Mr. Abington's lost profit model can be simplified as follows: lost production volume of 36,053 barrels multiplied by an incremental profit per barrel of $58.51 to arrive at his lost profit figure of $2,109,475. While such a model is appropriate, Mr. Abington's inputs are incorrect. Mr. Abington has overstated both the lost production volume and the incremental profit per barrel; consequently, his lost profit figure is significantly overstated.

Opinion 1: Mr. Abington Overstated Holly's Lost Production Volumes

As detailed in Table 1, Mr. Abington opined that but for the Incident, Holly would have produced an average of 27,621 barrels per day during his Damage Period, for a total of 168,599 barrels.

Table 1: Lost Production Volumes per Mr. Abington[5]

	Barrels Per Day	Damage Period in Days	Total Barrels
But for production	27,621	6.104	168,599
Actual production	21,715	6.104	132,548
Lost production	5,906	6.104	36,050

Holly's actual production during Mr. Abington's Damage Period averaged 21,715 barrels per day, for a total of 132,548 barrels. Thus, Mr. Abington determined that Holly's lost production volume was 5,906 barrels per day, or 36,050 barrels in total. Mr. Abington's but for production volumes and actual production volumes are both inappropriate.

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[5] See the August 17, 2012 report of William B. Abington, Exhibit 3.

Mr. Abington's But For Production Volumes Are Overstated

Mr. Abington arrived at his but for daily production volume of 27,621 based on the average production levels of the seven days prior to the Incident. Mr. Abington makes the following comments in support of his seven-day "benchmark" period:

- "Holly has stated that the operations of the Refinery for the days immediately prior to the Incident represent the most likely level of operations during the Damage Period. Because planned output of the various products can change from month to month, it is most appropriate to estimate production during the Damage Period based upon a period of time in the same month."[6]

- "We analyzed the production volume for the six weeks prior to the Damage Period and determined that the average daily production was 27,663 barrels, which is close to the average daily barrels of 27,621 from the Benchmark Period."[7]

Neither of these statements provides reasonable support for Mr. Abington's artificially short seven-day benchmark period for the following two reasons.

First, Holly's output does not appear to vary significantly from month to month; thus, there was no need for Mr. Abington to limit his benchmark period to an artificially shortened seven-day period within the same month. The Holly Operation Production System daily reports (the "HOPS" reports), which Holly provided for February 15, 2008 through June 23, 2008, show that the relative production levels of Holly's primary products—i.e., unleaded, premium unleaded and ultra-low sulfur diesel, which make up over 90% of Holly's production volumes—remained fairly consistent from month to

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[6] See the August 17, 2012 report of William B. Abington, pages 4–5.
[7] See the August 17, 2012 report of William B. Abington, page 5.

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month throughout this period. Furthermore, as detailed in Table 2, the relative monthly production levels were also similar to Mr. Abington's seven-day benchmark period.

Table 2: Holly's Average Relative Production Levels (percent of total Production)[8]

Product	Feb. 15–29	March	April	May	Jun. 1–23	Abington's Benchmark Period (Apr. 16–22)
Unleaded	64%	51%	53%	47%	48%	55%
Premium Unleaded	16%	10%	9%	10%	8%	8%
#2 Ultra Low Sulfur Diesel	32%	32%	28%	33%	30%	33%

Second, although Mr. Abington states that he also compared his seven-day benchmark period to a six-week period, Mr. Abington in fact only made a comparison to a four-week period since he excluded two of the six weeks. This four-week period is slightly longer but still artificially short since Mr. Abington has ignored approximately half of the pre-Incident daily production data provided by Holly. Holly's average daily production volume for February 15 through April 22, 2008 (which is the extent of the pre-Incident data provided by Holly, excluding April 2–13, 2008, during which Holly experienced a reformer outage unrelated to this matter[9]) was 25,876, which is nearly 2,000 barrels a day fewer than Mr. Abington's benchmark figure of 27,621.[10] Mr. Abington has provided no reasonable rationale for excluding this substantial volume of data from his analysis.

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[8] See Attachment 5.
[9] See the June 13, 2012 deposition of Fred Dunbar, page 118, lines 12–18.
[10] See Attachment 3.

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<u>Mr. Abington's Actual Production Volumes Are Inappropriate</u>

Mr. Abington's actual production volumes are also inappropriate since Mr. Abington relied on an artificially short seven-day period, which does not account for the large daily variability in Holly's production. An analysis of all of the daily production data provided by Holly reveals that the actual production volumes during the April 24–29, 2008 portion of Mr. Abington's Damage Period is not statistically different than Holly's historical production levels.

From February 15 to April 22, 2008, Holly's production volumes varied between 11,894 and 37,305 barrels per day. During the six-day portion of Mr. Abington's Damage Period from April 24–29 (excluding April 23, 2008 when the power outage occurred), Holly's production volumes varied between 16,415 and 26,540 barrels per day, with a total production for the six-day period of 132,548 barrels. Holly's production volume during the six-day period is not statistically different from its historical production volumes.[11] Accordingly, Mr. Abington should have limited his calculation of lost profits to the 9.08 hours—from 4:55 PM on April 23, 2008, to 2:00 AM on April 24, 2008—during which the refinery was not operational.[12] Based on Holly's historical daily production volumes of 25,876 barrels, Holly lost the production of 9,788 barrels during those 9.08 hours.[13]

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[11] The daily production data varied significantly between February 15, 2008 and April 22, 2008. The production data for the six days after the power was restored all fall within the range of the distribution of production data for that time period. While the production average for the six days from April 24 - 29 is lower than the overall average for the period from February 15, 2008 to April 22, 2008, approximately 15% of all possible averages for continuous 6 day increments have a lower production average than the period from April 24–29. Therefore, it cannot be concluded from the data available that the period from April 24–29 is statistically different from its historical production volumes.

[12] See the October 17, 2008 letter from Denise C. McWatters of Holly to Patrick Greene of Benham at Deposition Exhibit 24.

[13] See Attachment 3. 25,876 barrels per day, divided by 24 hours equals 1,078 barrels per hour; 1,078 barrels per hour multiplied by 9.08 hours equals 9,788 barrels.

While it is possible that Holly's production level was reduced during the six-day period of April 24–29, 2008 due to the Incident, given the previously discussed problems with Mr. Abington's analysis, his analysis cannot be relied upon to identify a reduction; moreover, my review of the data does not reveal a reduction. Nevertheless, if I were to accept Mr. Abington's average actual daily production volume during the Damage Period of 21,715 barrels and compare it to Holly's historical average daily production volume of 25,876 barrels, Holly's lost production volume would be 25,399, or 30% less than the 36,050 lost barrels of production put forward by Mr. Abington.[14]

Opinion 2: Mr. Abington Overstated Holly's Incremental Profit Per Barrel

Mr. Abington opines that Holly experienced lost profits of $2,109,475 as a result of losing 36,050 barrels of production during the Damage Period, which equals lost profits of $58.51 per barrel. This figure is significantly higher than the profit per barrel reported in Holly's financial statements and thus overstates Holly's lost profits.

In its June 30, 2008 financial statements filed with the Securities and Exchange Commission, Holly reported that the Refinery Gross Margin for the three-month period of April, May and June 2008 was $12.49 per barrel.[15] The Refinery Gross Margin is calculated as the average sales price per produced barrel sold less "the average price...paid per produced barrel sold for crude oil and feedstocks and the transportation

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[14] The resulting lost profits from lost production would be $240,021 (25,399 barrels multiplied by the incremental profit per barrel of $9.45). A revised but for daily production volume of 25,876 barrels less average actual daily volumes of 21,715 barrels equals a lost production volume of 4,161 barrels per day; 4,161 barrels per day multiplied by Mr. Abington's Damage Period of 6.104 days equals 25,399 barrels. In addition, on April 11, 2008, Holly's HOPS reports show that the refinery had a negative production of 47,273 barrels (see Attachment 5 and HWX000244). Since I have excluded the production volumes during April 2–13, 2008, the 47,273 negative production volume for April 11, 2008 is not in my calculation of the average daily production volumes. However, it appears that this entry is a correction to prior daily reports. To the extent that this figure should reduce the reported daily volumes included in my calculation, it would also reduce Holly's lost production volumes.

[15] See Form 10-Q for the quarterly period ended June 30, 2008 for Holly, page 30.

costs of moving the finished products to the market place."[16] The Refinery Gross Margin does not include other variable costs identified by Mr. Abington, such as electricity, natural gas, catalysts and chemicals. Mr. Abington determined that these other variable costs were $3.04 per barrel,[17] which further reduces Holly's incremental profit per barrel to $9.45 ($12.49 less $3.04)—a substantial difference from the $58.51 profit per barrel in Mr. Abington's analysis.

Mr. Abington's overstatement of lost profits is further illustrated by reviewing Holly's historical profitability. During the first and second quarters of 2008, Holly's average profits were approximately $317,000 and $297,000 per day, respectively.[18] In contrast, Mr. Abington has taken the position that Holly's lost profits for 1.3 days of lost production were $2.1 million, or about five times Holly's typical daily profits.[19]

Mr. Abington's incremental profit per barrel is overstated in part because he did not include transportation costs, which are included in Holly's Refinery Gross Margin and are an incremental cost.

In addition, Mr. Abington's artificially short benchmark period did not account for the large swings in the refinery's daily input of crude oil and other feedstocks. Specifically, during Mr. Abington's Damage Period, the ratio of feedstock to production

[16] See Form 10-Q for the quarterly period ended June 30, 2008 for Holly, pages 31-32.
[17] Total other but for variable costs per Mr. Abington were $512,193 (see the August 17, 2012 report of William B. Abington, page 6); $512,193 divided by Mr. Abington's but for volumes of 168,599 barrels is equal to $3.04 per barrel.
[18] Profit is measured as the Refining Gross Margin. See Holly's Form 10-Q for the quarterly periods ended March 31, 2008 and June 30, 2008, pages 40-41 for Q1 and pages 45-46 for Q2. For Q1, Holly's "refined product sales from produced products sold" at the Woods Cross refinery was $237,045,000 and Holly's "cost of products for produced products sold" was $208,174,000, for a Refinery Gross Margin of $28,871,000 for the quarter and $317,264 per day. For Q2, Holly's "refined product sales from produced products sold" at the Woods Cross refinery was $288,125,000 and Holly's "cost of products for produced products sold" was $261,086,000, for a Refinery Gross Margin of $27,039,000 for the quarter and $297,132 per day.
[19] Mr. Abington opined that Holly's lost production was 36,050 barrels during the Damage Period and that the average but for production would have been 27,621 barrels per day; thus, Holly lost the equivalent of 1.3 days of production.

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was 111% (e.g., for every 111 barrels of crude oil and feedstock that went into the refinery, 100 barrels of finished product came out).[20] Holly's historical ratio of feedstock to production is 104%.[21] While this ratio may have increased during Mr. Abington's Damage Period due to the additional flaring that occurred at the time of the Incident, Holly calculated that only 1,096 barrels were lost due to flaring.[22] Such a volume of flaring would cause less than a 1% increase in the ratio of feedstock to production.[23]

The remaining difference is likely due to the normal daily fluctuations in the refinery's inputs and outputs. During the period of February 15 through April 22, 2008, the refinery's daily production varied between 11,894 and 37,305 barrels and the daily input of feedstock varied between 14,709 and 40,245 barrels.[24] Given the large daily variability in the refinery's inputs and production, it is not appropriate to base a lost profit analysis on the feedstock usage of a seven-day period, as was done by Mr. Abington. Mr. Abington's inappropriate analysis resulted in a $49.06 per barrel overstatement of Holly's incremental profits.

V.   CONCLUSION

Since Mr. Abington overstated both Holly's lost production volumes and its incremental profit per barrel, Mr. Abington's lost profits are also overstated. Based on the but for production volume during the power outage and Holly's incremental profit per

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[20] See the August 17, 2012 report of William B. Abington, page 3 of Exhibit 3. Average daily feedstock of 23,999 barrels divided by average daily production of 21,715 barrels is equal to 111%.
[21] See Attachment 4.
[22] See Exhibit B to the October 17, 2008 letter from Denise C. McWatters of Holly to Patrick Greene of Benham at Deposition Exhibit 24.
[23] Actual production during Mr. Abington's Damage Period was 132,548 barrels. Based on the historical ratio of feedstock to production of 104.1% (see Attachment 4), Holly would have been expected to have 137,982 barrels of feedstock during the Damage Period. Adding 1,096 barrels due to flaring would result in a ratio of 104.9%.
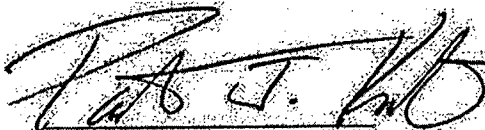[24] See Attachment 4.

barrel discussed previously, Holly's lost profits from lost production were $92,499. In addition, Holly claims that it experienced flare losses of $69,232, incremental labor costs of $38,447 and catalyst losses of $12,825.[25]

Table 3: Summary of Holly Lost Profits

	Per Abington	Corrected	
But for production in barrels	27,621/day	1,078/hour	
Damage period	6.104 days	9.08 hours	
Total but for production in barrels	168,599	9,788	
Actual production in barrels	132,548	0	
Lost production in barrels	36,050	9,788	
Incremental profit per barrel	$ 58.51	$	9.45
Lost profits from lost production	$ 2,109,475	$	92,499
Flare losses		$	69,232
Incremental labor costs		$	38,447
Catalyst losses		$	12,825
Total lost profits	$ 2,109,475	$	213,003

Thus, as summarized in Table 3, Holly's damages resulting from the Incident are $213,003.

Respectfully,

Patrick J. Kilbourne
Berkeley Research Group, LLC

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[25] See Exhibit B to the October 17, 2008 letter from Denise C. McWatters of Holly to Patrick Greene of Benham at Deposition Exhibit 24. I have not reviewed the supporting documentation or analysis for the claims but have incorporated these claims as put forward by Holly.